Filed 9/19/06 The Regents of the U.of Cal. v. Mad River Community Hosp. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Plaintiff and Respondent, v. MAD RIVER COMMUNITY HOSPITAL, Defendant, Cross-complainant, Cross-defendant and Appellant; CAPITOL ADMINISTRATORS, INC., Defendant, Cross-complainant, Cross-defendant and Appellant.	C048681 (Super. Ct. No. 03AS01743)
MAD RIVER COMMUNITY HOSPITAL, Cross-Complainant and Appellant, v. CLARENDON NATIONAL INSURANCE CO., Cross-Defendant and Respondent.	C049232 (Super. Ct. No. 03AS01743)

These consolidated appeals are taken from summary judgments entered in favor of defendant, cross-complainant and cross-defendant Capitol Administrators, Inc. (Capitol Administrators), and cross-defendant Clarendon National Insurance Co. (Clarendon). The underlying litigation concerns responsibility for the cost of medical services provided by plaintiff, The Regents of the University of California (the Regents), to two employees of defendant, cross-complainant and cross-defendant Mad River Community Hospital (Mad River) under an employee health care plan administered by Capitol Administrators and insured by Clarendon. The trial court concluded responsibility lies with Mad River. Mad River appeals from this determination and from an order awarding Clarendon attorney fees. Capitol Administrators cross-appeals from the denial of its motion for attorney fees. We reverse the award of attorney fees to Clarendon but otherwise affirm the judgment.

FACTS AND PROCEEDINGS

In March 2001, Capitol Administrators contracted with Mad River to provide claims administration services in connection with Mad River's self-funded employee health care program (the Administration Contract). The Administration Contract gave Capitol Administrators access to a bank account funded by Mad River for the payment of eligible claims and required Capitol Administrators to request that funds be deposited in this account as needed. However, Mad River retained final approval on payment of claims. Capitol Administrators was also

responsible for submitting claims for benefits under a "stop loss" insurance policy to be procured by Mad River for funding benefit claims above a certain threshold.

Mad River purchased a "stop loss" insurance policy from Clarendon for the period January 1, 2001 through December 31, 2001 (the Insurance Policy). The Insurance Policy provided that, for claims asserted under Mad River's employee health care program, Clarendon would reimburse Mad River for any amount paid on an individual claim in excess of $50,000. However, the Insurance Policy was a "12/12" policy, meaning that to be eligible for reimbursement, the expense must have been both incurred and paid by Mad River during the 12-month policy period.

Janet H., an employee of Mad River, received medical care at the University of California Davis Medical Center (UCDMC) between October 19, 2001 and November 20, 2001. At the time, Capitol Administrators informed UCDMC the expenses would be paid under Mad River's health care program. The cost of Janet H.'s care exceeded $300,000. Marsha S., another Mad River employee, received medical care from UCDMC between December 4 and December 21, 2001. Capitol Administrators again informed UCDMC the expenses would be paid. The cost of Marsha S.'s care also exceeded $300,000.

Capitol Administrators received notice of UCDMC's claim for medical care provided to Janet H. on December 1, 2001. However, because of the size of the claim, Capitol Administrators was required to perform an audit of the expenses and requested

further information from UCDMC. That information was not received until January 2002. The claim for payment of medical care provided to Marsha S. was not received by Capitol Administrators until January 2, 2002. Mad River did not provide funding to pay either claim during 2001 or thereafter.

The Regents, on behalf of UCDMC, initiated this action against Mad River and Capitol Administrators to obtain payment for the medical services provided to Janet H. and Marsha S. The complaint alleged breach of implied contract, negligent misrepresentation, quantum meruit, and estoppel.

Mad River filed a cross-complaint against Capitol Administrators and Clarendon seeking apportionment of fault and express indemnity. Mad River also alleged breach of contract and implied indemnity. Capitol Administrators in turn filed a cross-complaint against Mad River alleging express, implied and equitable indemnity.

Capitol Administrators filed a motion for summary judgment on the complaint and both cross-complaints. After a number of continuances requested by Mad River to obtain further discovery, the court granted the motion. The court concluded it was impossible for either Capitol Administrators or Mad River to have paid the UCDMC claims in 2001, Mad River was ultimately responsible for those claims, Capitol Administrators did not breach its contract with Mad River, and Capitol Administrators was entitled to both express and equitable indemnity. The court entered judgment for Capitol Administrators on the complaint and both cross-complaints.

Capitol Administrators filed a motion to fix attorney fees in the amount of $109,736.25 as an item of costs. It asserted the attorney fees were incurred "because Mad River refused to fund the subject claims and further willfully refused to indemnify Capitol Administrators as it was required to do." The trial court denied the motion.

Clarendon moved for summary judgment on Mad River's cross-complaint. The trial court granted the motion, concluding insurance coverage was precluded because Mad River did not pay the claims within the policy period and Mad River had not alleged bad faith or breach of fiduciary duty. The court granted Clarendon's motion for attorney fees in the amount of $48,620.25.

Mad River appeals from the summary judgment entered in favor of Capitol Administrators. The Regents also appealed from the summary judgment, but that appeal has since been abandoned. Capitol Administrators cross-appeals from the order denying its motion for attorney fees. Finally, Mad River appeals from the judgment and award of attorney fees in favor of Clarendon. We have consolidated these appeals for all purposes.

DISCUSSION

I

Dismissal of Mad River's Cross-complaint

Mad River contends the trial court erred in granting summary judgment to Capitol Administrators on Mad River's cross-complaint. Mad River asserts it dismissed the cross-complaint

prior to the hearing on the motion and, therefore, the court had no jurisdiction to rule on the matter.

Capitol Administrators counters that there is no evidence in the record of Mad River's dismissal of the cross-complaint. Instead of including a copy of the purported dismissal in the record on appeal, Mad River attached a copy to its opening brief. Mad River asserts it "has properly sought to supplement the record with an endorsed filed copy showing the timely dismissal of [Mad River]'s cross-complaint against [Capitol Administrators]." It has not. Mad River has filed no request to supplement the record on appeal. Nor has it made a request for judicial notice.

It is the appellant's burden to assure the record on appeal is sufficient to resolve the issues raised. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575.) Mad River has failed to satisfy this burden. Merely attaching a copy of a document to a party's brief on appeal will not suffice to add the document to the record. We shall consider Mad River's argument no further.

II

Capitol Administrators' Attorney Fees

In its order granting Capitol Administrators' motion for summary judgment, the trial court awarded Capitol Administrators its costs, including reasonable attorney fees, in defending the complaint of UCDMC, defending the cross-complaint of Mad River, and prosecuting the cross-complaint against Mad River. Capitol

Administrators thereafter filed a memorandum of costs and a motion to fix attorney fees as an item of costs. The trial court awarded costs in the amount of $4,434 but, despite its earlier ruling, denied attorney fees.

Capitol Administrators contends the trial court erred in denying its motion for attorney fees. Code of Civil Procedure section 1033.5 permits an award of attorney fees as costs if authorized by contract, statute or law. (Code Civ. Proc., § 1033.5, subd. (a)(10).) Capitol Administrators argues fees are authorized both under the terms of the Administration Contract and under principles of implied or equitable indemnity. We are not persuaded.

A. The Administration Contract

Capitol Administrators contends section 6.2 of the Administration Contract authorized an award of attorney fees under the circumstances of this case. It reads: "[Mad River] will indemnify [Capitol Administrators] and hold [Capitol Administrators] harmless against any losses, liabilities, penalties, fines, costs, damages, and expenses, including reasonable attorneys' fees[,] [Capitol Administrators] incurs [(1)] as a result of [Capitol Administrators'] acting upon [Mad River]'s instructions, and/or [(2)] due to [Mad River]'s gross negligence or willful misconduct relating to this Agreement." Capitol Administrators argues both prongs of this section apply here.

Regarding the first prong, Capitol Administrators asserts "the subject claims and [Regent]'s allegations against Capitol Administrators arose out of Capitol Administrators[']s actions pursuant to directions from Mad River." Capitol Administrators points out that, under the Administration Contract, Mad River was solely responsible for funding claims, Capitol Administrators had no control over Mad River's checking account, Mad River decided which checks to fund, only checks funded by Mad River could be processed by Capitol Administrators, and checks over $5,000 were handled by Mad River alone. Capitol Administrators asserts the checks it prepared for payment to UCDMC were held by Mad River and never paid.

If, as Capitol Administrators argues, UCDMC's claims were not paid because the checks prepared by Capitol Administrators were held by Mad River, and the Regents filed suit to obtain the withheld payments, the Regents' lawsuit was not based on Capitol Administrators' actions at the direction of Mad River, but on the actions of Mad River itself. In other words, it is not that Capitol Administrators did something or failed to do something that caused the Regents to file suit. Rather, Capitol Administrators did all it was required to do, but Mad River did not follow through on its obligations. Under these circumstances, the first prong of section 6.2 of the Administration Contract is inapplicable.

Capitol Administrators contends the second prong of section 6.2 applies. According to Capitol Administrators, Mad River's conduct amounted to gross negligence or willful misconduct,

because Mad River knew it was responsible for paying the claims but failed to do so, telling UCDMC that Capitol Administrators was responsible for payment.

The trial court found no gross negligence or willful misconduct, explaining: "Mad River's refusal to fund the claims and refusal to indemnify Capitol [Administrators] may be actionable but it does not rise to the level of gross negligence or willful misconduct." The court defined gross negligence as "'want of even scant care or an extreme departure from the ordinary standard of conduct,'" citing *Van Meter v. Bent Construction Co.* (1956) 46 Cal.2d 588, 594. It defined willful misconduct as "conduct that 'encompasses not only intentional wrongdoing but negligence of such a character as to constitute reckless disregard for the rights of others.'" For this definition, the court cited *Felburg v. Don Wilson Builders* (1983) 142 Cal.App.3d 383, 391.

Capitol Administrators does not take issue with the trial court's definitions of the terms used in the Administration Contract. Rather, Capitol Administrators argues the conduct of Mad River falls within the scope of those definitions. In particular, Capitol Administrators argues: "Mad River knew that it was responsible for the subject claims and that it was contractually required to indemnify Capitol Administrators. Nonetheless, Mad River refused to make payment to a health care provider to which it owed money for services rendered but wrongfully told that creditor health care provider that Capitol Administrators was responsible for the payment. Mad River did

this with the knowledge and intent that Capitol Administrators would be sued and forced to incur substantial defense costs."

The evidence presented to the trial court is not so cut and dried. Whether Mad River knew it was contractually obligated to indemnify Capitol Administrators presupposes the very point Capitol Administrators is trying to establish. Only if Mad River's conduct amounted to gross negligence or willful misconduct was it obligated to indemnify Capitol Administrators.

Thus, Capitol Administrators' claim comes down to the fact that Mad River knew it was obligated to pay for the medical care but failed to do so. In this regard, Mad River presented evidence that it relied on Capitol Administrators, as the professional plan administrator, to look out for Mad River's interests. As it turns out, that reliance was misplaced. Capitol Administrators had no contractual obligation to treat end-of-the-year claims any differently than other claims. There was no requirement that those claims be expedited and no requirement that Capitol Administrators alert Mad River of a claim that might fall outside of insurance coverage.

Nevertheless, evidence was presented from an industry expert who had worked with Capitol Administrators in the past that third party administrators like Capitol Administrators typically watch large claims and work with the insurance carriers to make sure they are paid. According to this expert, it "looked like something had fallen through the cracks." Another witness testified that Capitol Administrators represented that it had an employee specifically watching out

for Mad River's interests with respect to large, end-of-the-year claims. Thus, Mad River may have been responsible for paying the two claims, but it was not gross negligence or a reckless disregard for the rights of others for Mad River to have believed Capitol Administrators caused it to lose insurance coverage on those claims and was obligated to pay some or all of the expenses. The trial court's conclusion is supported by the record.

Capitol Administrators contends another provision of the Administration Contract provides a right of indemnity that is not limited to claims arising from actions taken at Mad River's direction or based on Mad River's gross negligence or willful misconduct. Section 6.4.1 of Exhibit VIII to the Administration Contract states: "[Mad River] shall hold harmless and indemnify [Capitol Administrators] from any claims, losses, damages, liabilities, costs, expenses or obligations arising out of or resulting from the acts or omissions of [Mad River], its officers, employees and agents in the performance of [Mad River]'s obligations under this Agreement." Further, Capitol Administrators cites Civil Code section 2778, which states that "[a]n indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the costs of defense against such claims, demands, or liability incurred in good faith, and in the exercise of a reasonable discretion." (Civ. Code, § 2778, subd. (3).)

Capitol Administrators' reliance on the foregoing provision is misplaced. Exhibit VIII to the Administration Contract is

itself a contract, called the “Customer Services Agreement,” that is incorporated into the Administration Contract by reference. The Customer Services Agreement concerns the detection and investigation of fraudulent or abusive practices in the delivery of health care services. The first sentence of the Customer Services Agreement defines the term “Agreement” to mean the Customer Services Agreement. Thus, when section 6.4.1 of Exhibit VIII says Mad River is obligated to indemnify Capitol Administrators against any claims arising out of the performance of Mad River’s obligations “under this Agreement,” it is referring to the Customer Services Agreement, not the Administration Contract. There is no suggestion here that the Regents’ claims arose from Mad River’s performance of its obligations under the Customer Services Agreement.

B. Implied or Equitable Indemnity

Capitol Administrators contends that, even if the express indemnity provisions in the Administration Contract do not provide relief, it is entitled to implied or equitable indemnity.

Aside from contract, indemnity “may find its source in equitable considerations brought into play either by contractual language not specifically dealing with indemnification or by the equities of the particular case.” (*Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1736.) “‘[E]quitable indemnification is a matter of fairness.’ [Citation.] The doctrine of comparative equitable indemnity is

applied to multiple tortfeasors and is designed to apportion loss among tortfeasors in proportion to their relative culpability so there will be an equitable sharing of the loss among multiple tortfeasors. [Citations.] Implied contractual indemnity is applied to contract parties and is designed to apportion loss among contract parties based on the concept that one who enters a contract agrees to perform the work carefully and to discharge foreseeable damages resulting from that breach." (*Ibid.*)

However, "[w]here, as here, the parties have expressly contracted with respect to the duty to indemnify, the extent of that duty must be determined from the contract and not by reliance on the independent doctrine of equitable indemnity." (*Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628.)

Capitol Administrators contends it is nevertheless entitled to equitable indemnity. It relies on *E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 508, where the high court said: "[W]hen parties by express contractual provision establish a duty in one party to indemnify another, 'the extent of *that duty* must be determined from the contract and not from the independent doctrine of equitable indemnity.' (Italics added.) [Citations.] When, however, the duty established by contract is by the terms and conditions of its creation inapplicable to the particular factual setting before the court, the equitable principles of implied indemnity may indeed come into play."

The present matter is governed by the first sentence of the above passage, not the second. In *E. L. White*, the question was whether an express indemnity provision in favor of one contracting party precluded an implied indemnity provision in favor of the other. Because the contract provided no right of indemnity in the other party, the court concluded implied indemnity was not foreclosed. Here, there is an express indemnity provision in favor of Capitol Administrators. Thus, Capitol Administrators' right of indemnity is governed by that provision, not principles of implied or equitable indemnity. (See *Mel Clayton Ford v. Ford Motor Co.* (2002) 104 Cal.App.4th 46, 54; *Maryland Casualty v. Bailey & Sons* (1995) 35 Cal.App.4th 856, 864; *Regional Steel Corp. v. Superior Court* (1994) 25 Cal.App.4th 525, 529; *Peter Culley & Associates v. Superior Court* (1992) 10 Cal.App.4th 1484, 1492.)

Capitol Administrators asserts it is entitled to equitable indemnity by virtue of its status as Mad River's agent. "'An agent is one who represents another, called the principal, in dealings with third persons.' (Civ. Code, § 2295.) As a general rule, an agent is entitled to indemnification by its principal for losses incurred by the agent in the execution of the agency." (*Fidelity Mortgage Trustee Service, Inc. v. Ridgegate East Homeowners Association* (1994) 27 Cal.App.4th 503, 509.)

Capitol Administrators did not raise agency as a basis for its indemnity claim below. As a general matter, appellate courts will not consider issues or theories raised for the first

time on appeal unless the question is one of law to be applied to undisputed facts. (*Johanson Transportation Service* v. *Rich Pik'd Rite, Inc.* (1985) 164 Cal.App.3d 583, 588.) At any rate, Capitol Administrators' agency argument runs headlong into section 6.2 of the Administration Contract, which expressly limits the scope of indemnity owed by Mad River.

Finally, Capitol Administrators contends it is entitled to indemnity under Code of Civil Procedure section 1021.6, which reads: "Upon motion, a court after reviewing the evidence in the principal case may award attorney's fees to a person who prevails on a claim for implied indemnity if the court finds (a) that the indemnitee through the tort of the indemnitor has been required to act in the protection of the indemnitee's interest by bringing an action against or defending an action by a third person[,] and (b) if that indemnitor was properly notified of the demand to bring the action or provide the defense and did not avail itself of the opportunity to do so, and (c) that the trier of fact determined that the indemnitee was without fault in the principal case which is the basis for the action in indemnity or that the indemnitee had a final judgment entered in his or her favor granting a summary judgment, a nonsuit, or a directed verdict."

Capitol Administrators contends Code of Civil Procedure section 1021.6 is applicable here because the Regents' complaint contained causes of action sounding in tort and "Capitol Administrators has been forced to defend against [the Regents']

action as a result of Mad River's tortious and willful failure to fund the two subject claims."

The second cause of action of the Regents' complaint alleged negligent misrepresentation. In particular, the Regents alleged that, on October 19, 2001, and November 6, 2001, Capitol Administrators represented that benefits would be paid for the care provided by UCDMC to Janet H. and, on November 26, 2001, Capitol Administrators represented that benefits would be paid for the care provided to Marsha S. The Regents further alleged UCDMC relied on these representations and did not seek alternate financing, but Capitol Administrators refused to comply with its representations.

This cause of action does not state a claim for tortious conduct by Mad River. It states negligent misrepresentation by Capitol Administrators alone. Thus, Capitol Administrators was not required to answer for the tort of Mad River.

Capitol Administrators contends the Regents also alleged a claim for estoppel, "which the trial court held could sound in tort." The court did not so find. Capitol Administrators relies on a minute order issued by the trial court at the time it sustained Capitol Administrators' demurrers to two causes of action in the complaint. Capitol Administrators had argued that, as the agent of a disclosed principal (Mad River), it was not liable for any claim sounding in contract. The court sustained demurrers to the first and third causes of action, which alleged breach of implied contract and quantum meruit, but overruled the demurrer to the fourth cause of action, alleging

estoppel. The court explained: "The demurrer as to the 4th cause of action for estoppel has not been shown to sound in contract . . . ."

The fact that the estoppel claim did not sound in contract does not mean it sounded in tort. The claim was essentially one for promissory estoppel. The Regents alleged Capitol Administrators and Mad River represented that Janet H. and Marsha S. had insurance coverage and UCDMC relied on these representations to provide medical care.

"'In California, under the doctrine of promissory estoppel, "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires." [Citations.] Promissory estoppel is "a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced."'" (*Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 692.)

In effect, promissory estoppel is akin to a claim based on contract except that the consideration needed to form a binding agreement is provided by detrimental reliance. (*Signal Hill Aviation Company, Inc. v. Stroppe* (1979) 96 Cal.App.3d 627, 640.) Like quantum meruit, which the trial court concluded sounded in contract despite the absence of either an express or implied agreement, promissory estoppel sounds more in contract

than in tort. (*Baillargeon v. Department of Water & Power* (1977) 69 Cal.App.3d 670, 682.) It is based on a promise rather than a misrepresentation. It is not a tort claim and, hence, will not give rise to a right of indemnity under Code of Civil Procedure section 1021.6.

C. Civil Code section 1717

Capitol Administrators contends it is entitled to attorney fees as the prevailing party in the litigation. It relies on Civil Code section 1717, which states in part: "(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." It is undisputed Capitol Administrators was a prevailing party in this action.

Capitol Administrators misunderstands the nature of Civil Code section 1717. That section provides a right of attorney fees *in a dispute over a contract* where the contract contains a provision allowing such fees. In such case, the function of section 1717 is to make reciprocal an otherwise unilateral attorney fee provision. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610-611.) However, the contract must contain a provision

allowing one or both parties to recover the expense of prevailing in an action to enforce the contract.

Capitol Administrators contends section 6.2 of the Administration Contract is such a provision. It is not. As discussed above, that section provides Capitol Administrators a right of indemnity. "Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person." (Civ. Code, § 2772.) Indemnity is concerned with liability to a third party. Where applicable, section 6.2 of the Administration Contract allows Capitol Administrators to recover costs, including attorney fees, of defending against an action brought against it by a third party. "Such a clause is not a prevailing-party-attorney-fee provision within the meaning of Civil Code section 1717, but an enumeration of the scope of the indemnity." (*M. Perez Co., Inc. v. Base Camp Condominiums Assn. No. One* (2003) 111 Cal.App.4th 456, 463.) "[T]he inclusion of attorney fees as an item of loss in a third party claim indemnity provision does not constitute a provision for the award of attorney fees in an action on contract as is required to trigger operation of Civil Code section 1717." (*Campbell v. Scripps Bank* (2000) 78 Cal.App.4th 1328, 1337.)

There being no prevailing party attorney fees provision in the Administration Contract, Civil Code section 1717 is inapplicable.

III

Exclusion of Evidence

Mad River disclosed its list of experts on July 19, 2004. On August 10, Mad River moved to augment its expert witness list to add James Dunathan. In support of the motion, Mad River's attorney submitted a declaration that explained: "Prior to July 19, 2004, we had attempted to obtain and designate James Dunathan, but due to the illness and hospitalization of his wife, we were unable to reach him." Counsel continued: "After July 19, 2004, we were able to contact him, consult with him and obtained his declaration . . . ." Finally, counsel explained: "Our office had expected defendants to list expert witnesses in their CCP § 2034 disclosures[.] [H]owever, no party submitted any witnesses."

The trial court denied the motion to augment. The court concluded Mad River's inability to contact Dunathan before July 19 "is not mistake, inadvertence, surprise, or excusable neglect." The court further explained: "It appears that [Mad River] knew it needed a retained expert and if it was unable to contact the expert, it should have designated someone else."

In opposition to Clarendon's motion for summary judgment, Mad River submitted the declaration of James Dunathan. Dunathan opined that Clarendon had notice of the claims for medical care provided to Janet H. and Marsha S. and "had a duty of due care and a fiduciary duty to Mad River . . . to pay these claims and to protect Mad River . . . ." According to Dunathan, "[a]t the

very least Clarendon had a duty to advise and warn Mad River . . . that Clarendon would not pay the claims unless and until Mad River . . . first paid the claims." As an alternative, Dunathan suggested that Clarendon should have agreed to continue insuring Mad River for another year.

Clarendon objected to Dunathan's declaration, and the trial court sustained the objection.

Mad River contends this was error because the motion to augment the expert witness list should have been granted. According to Mad River, the failure to designate Dunathan was due to mistake, inadvertence, surprise, or excusable neglect. Mad River argues it reasonably anticipated Dunathan would respond to its "flurry of telephone calls and attempted contacts" during the final two days before the expert list was due. Mad River further argues it reasonably anticipated that at least one of the other parties would designate an expert, thereby giving Mad River an opportunity to submit a supplemental designation. Finally, Mad River asserts it was surprised when neither came to pass.

Mad River's argument addresses only one objection raised by Clarendon. Clarendon raised four others: (1) Dunathan's opinions address legal conclusions, and the declaration is (2) irrelevant, (3) incompetent, and (4) lacking proper foundation. In its order granting Clarendon's motion for summary judgment, the trial court sustained the objections to Dunathan's declaration without specifying the basis for its ruling. Inasmuch as the record contains no transcript of any hearing

that may have taken place on Clarendon's motion, we are left to guess at the trial court's rationale.

As stated earlier, it is an appellant's burden to assure the record on appeal is sufficient to resolve the issues raised. (*Maria P. v. Riles*, *supra*, 43 Cal.3d at pp. 1295-1296.) Because we do not know the basis of the trial court's ruling, we will uphold it if supported by any of the bases asserted by Clarendon.

Mad River has raised no arguments as to whether Dunathan's opinions address legal conclusions, are irrelevant, are incompetent, or lack proper foundation. A point not argued or supported by citation to authority is forfeited. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) We will not act as counsel for Mad River and furnish a legal argument as to how the trial court erred. (See *In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1164.) On the present record, we cannot determine which of the five bases raised by Clarendon the trial court used to sustain the objections to Dunathan's declaration. Any one will suffice. Since Mad River only takes issue with one of the five bases, and ignores the others, we need consider the matter no further.

IV

Clarendon's Attorney Fees

Section VII of the Insurance Policy contains a "Hold Harmless" provision that reads in relevant part: "[Mad River] agrees to indemnify and hold [Clarendon] harmless for any legal

expenses incurred, reasonable settlement made, or judgment(s) awarded, arising out of any dispute involving a participant or former participant of [Mad River]'s Employment Benefit Plan provided such legal expenses, settlements, or judgments were not incurred as a result of the sole negligence or intentional wrongful acts of [Clarendon]."

Following entry of summary judgment to Clarendon on Mad River's cross-complaint, Clarendon filed a motion to fix attorney fees in the amount of $48,620.25 as an item of costs. The trial court granted the motion. The court explained the underlying suit "involved coverage for the care given by the Regents to Mad River's insureds" and, therefore, falls within the scope of the "Hold Harmless" provision in the Insurance Contract.

Mad River contends the trial court erred in awarding attorney fees to Clarendon, because Clarendon failed to assert a contractual basis for such fees before entry of summary judgment and the trier of fact never determined that Clarendon was entitled to such fees. Mad River cites *Hsu v. Semiconductor Systems, Inc.* (2005) 126 Cal.App.4th 1330 (*Hsu*), where the court said: "Recovery of costs provided by contract must be specially pleaded and proven at trial, and not awarded posttrial as was done here. [Citations.] '[T]he proper interpretation of a contractual agreement for shifting litigation costs is a question of fact that "turns on the intentions of the contracting parties."' [Citation.] Accordingly, 'the issue must be submitted to the trier of fact for resolution pursuant

to a prejudgment evidentiary proceeding, not a summary postjudgment motion.'" (*Id.* at pp. 1341-1342.)

Hsu is readily distinguishable. The issue there was not the recovery of attorney fees, but expert witness fees. (*Hsu, supra,* 126 Cal.App.4th at pp. 1340-1341.) As stated earlier, Code of Civil Procedure section 1033.5 permits an award of attorney fees as an item of costs if authorized by contract, statute or law. (Code Civ. Proc., § 1033.5, subd. (a)(10).) In this instance, it is claimed attorney fees that are authorized by contract. Expert witness fees, on the other hand, are specifically excluded as an item of costs unless otherwise authorized by law. (Code Civ. Proc., § 1033.5, subd. (b)(1).)

Mad River contends there is no contractual basis for an award of attorney fees to Clarendon. Mad River argues the "Hold Harmless" clause in the Insurance Contract is an indemnity provision rather than a prevailing party attorney fees provision. As discussed earlier, an indemnity provision applies to third-party claims, not disputes between the contracting parties. An indemnity provision will not support an award of attorney fees under Civil Code section 1717. (*Campbell v. Scripps Bank*, *supra*, 78 Cal.App.4th at p. 1337.)

Clarendon contends the "Hold Harmless" provision is sufficiently broad to include Mad River's cross-complaint against Clarendon. That provision covers "any dispute involving a participant or former participant of [Mad River]'s Employment Benefit Plan." According to Clarendon, the cross-complaint is a dispute "involving" participants in the employee benefit plan,

inasmuch as it is related to the Regents' suit to obtain payment for medical care provided to participants of that plan.

Mad River has the better argument. Despite the broad language of the "Hold Harmless" clause, it specifically refers to a right of indemnity. Indemnity concerns the obligation resting on one party to make good a loss incurred by another. (*Rossmoor Sanitation, Inc. v. Pylon, Inc.*, *supra*, 13 Cal.3d at p. 628.) The "Hold Harmless" clause also establishes a right of reimbursement for "legal expenses incurred, reasonable settlement made, or judgment(s) awarded." Obviously, if this were a prevailing party attorney fees provision, there would be no reason to reimburse for any "settlements made" or "judgment(s) awarded." Rather, this provision contemplates a third-party action.

Furthermore, if this provision permitted an award of attorney fees to Clarendon in the event it prevails in an action "involving" a plan participant, Civil Code section 1717 would require that the provision be given reciprocal application. Thus, contrary to the clear language of the provision, Clarendon would be required to "indemnify and hold [Mad River] harmless" for any expenses arising out of any dispute involving a plan participant in the event Mad River prevails.

"Our goal in construing insurance contracts, as with contracts generally, is to give effect to the parties' mutual intentions. [Citations.] 'If contractual language is clear and explicit, it governs.' [Citations.] If the terms are ambiguous, we interpret them to protect '"the objectively

reasonable expectations of the insured."' [Citations.] Only if these rules do not resolve a claimed ambiguity do we resort to the rule that ambiguities are to be resolved against the insurer." (*Boghos v. Certain Underwriters of Lloyd's of London* (2005) 36 Cal.4th 495, 501.)

Here, if there is ambiguity as to whether the "Hold Harmless" provision calls for indemnity yet covers expenses arising out of *any* dispute involving a plan participant, that ambiguity must be interpreted in favor of Mad River.

Clarendon argues it repeatedly informed Mad River that Mad River's claims against Clarendon were without merit and repeatedly offered to waive attorney fees in exchange for dismissal of the cross-complaint, but Mad River ignored the offer. Clarendon argues Mad River should now be forced to reap what it has sown by paying the attorney fees it could easily have avoided.

This argument has no bearing on the issues raised in this appeal. For the reasons stated above, we conclude the trial court erred in awarding attorney fees to Clarendon.

DISPOSITION

The summary judgments entered in favor of Capitol Administrators and Clarendon are affirmed. The denial of attorney fees to Capitol Administrators as an item of costs is also affirmed. The award of attorney fees to Clarendon as an item of costs is reversed. The parties shall bear their own costs on appeal.

HULL, Acting P.J.

We concur:

BUTZ, J.

CANTIL-SAKAUYE, J.